Hearing:
January 13, 1998

Paper No. 19
JQ

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB

DEC. 29, 98

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Bahlsen KG
v.
Wild Ideas International, Inc.

Opposition No. 99,719
to application Serial No. 74/567,538
filed on August 30, 1994

Michael J. Striker for Bahlsen KG.

Paul A. Welter of Merchant, Gould, Smith, Edell, Welter & Schmidt for Wild Ideas International, Inc.

Before Seeherman, Quinn and Walters, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application has been filed by Wild Ideas International, Inc. to register the mark ZOOKIES for "cookies."[1]

[1] Application Serial No. 74/567,538, filed August 30, 1994, alleging dates of first use of November 1993. The Board notes that this application incorrectly matured into Registration No. 1,936,792 on November 21, 1995. The Board will forward the application file to the Assistant Commissioner for Trademarks for consideration of the cancellation of this inadvertently issued registration.

Registration has been opposed by Bahlsen KG under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to cookies, so resembles opposer's previously used and registered mark ZOO for "cookies"[2] as to be likely to cause confusion, or to cause mistake, or to deceive.

Applicant, in its answer, denied the salient allegations of likelihood of confusion.

The record consists of the pleadings; the file of the involved application; trial testimony, with related exhibits, taken by opposer; and a certified copy of opposer's pleaded registration made of record by opposer's notice of reliance. Applicant neither took testimony nor introduced any other evidence. Both opposer and applicant filed briefs on the case. An oral hearing was held at which only opposer's counsel appeared.

According to Frank Muchel, president of opposer's exclusive distributor in the United States, opposer's cookies are in the shapes of animals. The most recent figures show wholesale sales of $259,802 in 1995 which, according to Mr. Muchel, translates to approximately $500,00 at retail. Sales were expected to rise by about twenty per cent in 1996.

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[2] Registration No. 945,881, issued October 24, 1972; renewed.

No information about applicant's business activities under the applied-for mark is known.

Our determination under Section 2(d) is based on an analysis of all of the probative factors in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods.

We first turn our attention to the goods. The goods, as identified in opposer's registration and the involved application, are identical, that is, "cookies."[3] Moreover, applicant admits that the channels of trade are the same. Further, it is clear that the goods would be bought by the same purchasers.

We next turn to consider the marks. Given the identity between the parties' goods, we note, at the outset, that when marks are applied to identical goods, "the degree of similarity [between the marks] necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). The marks ZOO and

[3] The record indicates that, in reality, the nature of the cookies is identical, that is, cookies in the shapes of animals.

ZOOKIES share similarities in sound and appearance. We also find that the marks, when applied to identical goods, engender similar overall commercial impressions. Applicant has adopted the entirety of opposer's mark and merely added the portion "—KIES" to form ZOOKIES, a mark clearly suggestive of animal-shaped cookies. Although opposer's mark ZOO may be somewhat suggestive as well, the marks convey the same suggestion, namely animal-shaped cookies. And, while applicant has argued that this suggestiveness limits the scope of protection to be accorded opposer's mark, we also note that the record is devoid of evidence showing any third-party uses of the same or similar marks. In making our determination, we have kept in mind the normal fallibility of human memory over time and that the average consumer normally retains a general, rather than a specific, impression of trademarks encountered in the marketplace.

Another factor in favor of finding likelihood of confusion is the conditions under which sales are made. Although applicant asserts that there is no evidence to support opposer's proposition that cookies are casually purchased, we hardly can find fault with opposer's statement. Opposer's "cookies" are not restricted as to price, and it must be assumed that the cookies include lower-priced ones. Mr. Muchel testified that opposer's cookies are sold in places such as supermarkets and

warehouse club outlets. Based on the record (not to mention common knowledge), we have no problem agreeing with opposer that cookies are the subject of casual purchases.

Applicant takes opposer to task for its failure to submit any evidence of actual confusion. Suffice it to say that there is no meaningful way to gauge the absence of evidence of actual confusion given the fact that we do not know the extent of applicant's use of its mark. We are unable to ascertain, therefore, whether there has been an opportunity for actual confusion to have occurred in the marketplace. Also, given the relatively inexpensive nature of cookies, it is questionable whether any actual confusion on the part of purchasers would even be brought to the parties' attentions. In any event, the applicable test here is likelihood of confusion, not actual confusion, and, as often stated, it is unnecessary to show actual confusion in establishing likelihood of confusion. See, e. g., Weiss Associates Inc. v. HRL Associates Inc., 902 F.2d 1546, 1549, 14 USPQ2d 1840, 1842-3 (Fed. Cir. 1990).

In view of the above, we conclude that purchasers familiar with opposer's cookies sold under the mark ZOO would be likely to believe, upon encountering applicant's mark ZOOKIES for cookies, that the goods originated with or were somehow associated with or sponsored by the same entity.

Decision: The opposition is sustained and registration to applicant is refused.

E. J. Seeherman

T. J. Quinn

C. E. Walters
Administrative Trademark
Judges, Trademark Trial
and Appeal Board